No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENDRA MUSGRAVE,

Petitioner(s),

□against□

LAWRENCE P. WOLF, ESQ.,

Respondent(s)

On Petition For Writ Of Certiorari to the
United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

KENDRA MUSGRAVE
Pro Se
9985 Appletree Place
Thornton, Colorado 80260
303-452-2854

QUESTIONS PRESENTED

Does state sovereignty and doctrines of collateral estoppel and res judicata, bar a federal court order for discovery on facts and issues established in a prior proceeding in a state court?

1. Is a federal discovery order that is not (a) "for good cause," or (b) fails to limit discovery to at least statutory boundaries of "relevance to claims or defense," "relevant to subject matter involved in the action," constitute an illegal search and seizure under the Fourth Amendment?
2. Did Plaintiff receive due process?
3. Are statutory damages under Fair Debt Collection Practices Act 15 U.S.C. §1692, et seq. per violation or per action?

PARTIES TO THE PROCEEDING

Petitioner, Kendra Musgrave, pro se.
Defendant, Lawrence P. Wolf, Esq.

TABLE OF CONTENTS

TABLE OFAUTHORITIES

Cases

Statutes

Rules

Regulations

Constitutional Provisions

Local Provision

OPINIONS BELOW

STATEMENT OF JURISDICTION

Jurisdiction is pursuant to 28 USC §1251(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution: Article 4 Section 1, Fourth Amendment, Fifth Amendment, Seventh Amendment, Fourteenth Amendment, 15 U.S.C. §1692, et seq., 15 U.S.C. §1692k(c); Federal Rules of Civil Procedure Rule 5(d), Rule 8(c), Rule 12(a)(1)(A), Rule 26(b)(1), Rule 26(b)(2), Rule 26(f)(2), Rule 56(c); Federal Rules of Appellate Procedure Rule 4(a)(1)(A), United States District Court, Eastern District Local Rule 1.3

STATEMENT OF THE CASE

After Lawrence P. Defendant, Esq. altered a $9,855.18 money judgment rendered without trial by hearing officer Maria Milin in Housing Part of the Civil Court of the City and County of New York County ("Housing Part") under L&T Index No. 83622/00 ("NYC 83622/00") against one Dr. Margareta Griesz, to include Kendra Musgrave. The judgment was never served, not even to Kendra Musgrave's bank, where Defendant, by issuance of his own subpoena the restrained for seven months Kendra Musgrave's bank accounts, before such accounts were levied by City Marshal Martin Bienstock. The monies therefrom were received by Wembly Management, a non-existent entity under New York law, for the alleged debt of one Dr. Margareta Griesz-Brisson.

During all such time and thereafter Kendra Musgrave was denied Housing Part file for NYC 83622/00.

Kendra Musgrave filed order to show cause under opening NYC 83622/00 Civil Court of the City and County of New York ("Civil Court") to for the release of her bank account, all funds restored, and all fees incurred as a result, *inter alia*. The matter was referred to Civil Court of the City and County of New York ("Civil Court") to be determined by a judge as is required by Constitution Seventh Amendment.

Kendra Musgrave, was subsequently sued by Lawrence P. Wolf, Esq. on behalf of alleged judgment creditors in New York County L&T

Index No. 91440 02 ("NYC 91440 02), which was immediately dismissed with prejudice as against Kendra Musgrave for lack of jurisdiction.

Citing that Defendant's actions were taken "without legal basis," Kendra Musgrave's order to show cause was granted in its entirety by Hon. Joan Kenney of New York City Civil Court, New York County ("NYCCC").

Three months later, Kendra Musgrave filed motion for contempt in NYCCC under NYC 83622/00.

Without Defendant continuing to defy NYCCC Order, on May 16, 2003 Kendra Musgrave, (pro-se) ("Plaintiff") filed in the United States District Court, Eastern District of New York ("EDNY"), action under Fair Debt Collection Practices Act (15 U.S.C. §1692, et seq.) ("FDCPA") 03 CV 2511 against Lawrence P. Defendant, ("Defendant") on the basis that the actions already established in NYCCC and deemed by that court to be without "legal basis," also violated FDCPA. In opening paragraph IV "It is respectfully requested in all causes of action arising out of FDCPA in the immediate proceeding, the Court take judicial notice of Exhibit A, B, C and any and all subsequent papers thereto of New York City Civil Action 83622/00."

The federal court failed to issue Plaintiff a summons. Housing Part Hearing Officer Inez Hoyos then enforced judgment she rendered against Dr. Griesz-Brisson of now $20,448.355 against Kendra Musgrave. (See Musgave v. Hoyos, U.S. Supreme Court 04-1582)

Service was deemed valid in FDCPA action 03 CV 2511. Defendant's Answer was due August 25, 2003. When Plaintiff had not been served with Answer and did not find one in EDNY's file in this action as of September 5, 2003, Plaintiff filed a motion for summary judgment or in the alternative a default judgment, September 5, 2003.

An initial conference, was then ordered by Magistrate Lois Bloom, of the United States District Court, Eastern District of New York ("Magistrate").

On October 7, 2003, NYCCC Defendant in Contempt, citing he had "engaged in the sharp practice of law."

Attorney for Defendant, Robert F. Moroco, Esq., was not admitted to the Eastern District before he appeared on October 8, 2003, as

is required by Local Rule 1.3, and to date, as far as is known, is still not admitted to the Eastern District Court.

Without prompting from either Plaintiff or Defendant, the Court below told Plaintiff (All quotes are cited from transcript by page number and line in Appellant's joint appendix Second Circuit):

> COURT: "...This Court does not sit as an appellate court over the state courts." (A 29, Lines 21-22). The Court below also told her: "You've challenged that through the state court." (A 30, Lines 1-2). "But, again, Plaintiff, I want you to be very clear. The amount of litigation that you have gone through in the state courts is not going to be reviewed by this Court" and "There is no jurisdiction to review." (A 30, Lines 12-17);
>
> COURT: "Moreover, the Court is deprived of jurisdiction over state court actions, where what you're seeking to do is overturn a state court matter, under the Rooker Feldman doctrine."
>
> PLAINTIFF: "That's not what I'm doing."
>
> COURT: "Rooker Feldman provides that the federal courts may not reach issues which deal with claims that have already been litigated, albeit unsuccessfully, in the state court. So again, this Court is not going to touch whether or not the state court did this right." (A 43, Lines 16-25).

Court also stated "for some reason which I'm not clear, you filed a motion for a default judgment..." then ordered deposition.

> PLAINTIFF: " In order to take a deposition, they have to file an answer, in accordance with federal law. I was never served with an answer.
>
> COURT: "Ma'am, you are dealing with a federal court, now, I don't know where you've been before, but I am telling you, their answer is filed." (A 33, Lines 9-13).

In A-34-35, lines 25-13.

Plaintiff: "Can I see it, please, because by the Rules of Federal Procedure, it has to be served before it can be filed.

COURT: "Here it is, Ma'am?

Apparently, Plaintiff then failed to receiveDefendant's Answer, asking again, "Can I look at that, please?" (A-35, line 4),

COURT: "It doesn't matter to me if you look at it or you don't look at it; it's still been received by the Court."

PLAINTIFF "Okay, but I don't have one and I didn't receive it in Colorado. This is somebody's sworn statement," referring to the sworn statement enclosed therewith that the Answer was served before it was filed with the district court.

The Court interrupts "That's exactly right. Can I have that back, now?"

Plaintiff finishes "Who should be cross-examined."

COURT: "No, you don't have the right – this is not [illegible] housing court, Ms. Musgrave, and I want you to be clear on this, okay? Your conduct up until this moment has been as if you're appearing in one of the state courts. You filed this case. This is your case.

You don't have the right to cross-examine the process server who says that they served by mail and give your address at 9985 Apple Tree Place, Thornton, Colorado. The answer is on file with the Court. It's been accepted. Your default judgment motion is not going to go anywhere...." (A 35, Lines 14-23)

COURT: "I will assume that Plaintiff will handle herself in a professional manner. She's clearly read the statutes. She just believes that she may be in a different type of forum, where it's a much more rough-and-tumble world than the federal court is use to.

Ms. Musgrave, I want you to be clear. Your actions up until this point have not impressed the Court whatsoever.

> PLAINTIFF: "Ma'am I'm sorry. I don't know how I've offended you.'
>
> COURT: "Ma'am when I've told you that we've already settled the issue of the answer being filed with the Court and you ant to come and inspect, and you say that you had [American Clerical Service] come down to the Court and they didn't find it, all of that is on you. That's not for the Court's proceedings."
>
> PLAINTIFF: "I apologize, but the fact remains I never received it. If I go back to Colorado and post date is later than the service date, then I think that would disqualify it. But, if I didn't receive it, I didn't receive it.
>
> COURT: "Plaintiff, let's start again. There is no default here… What day are you going to make yourself available for a full day deposition" A-38-39. Lines 2-2.

Defendant had made no oral application for deposition at initial conference.

Both parties were willing to meet at EDNY for deposition. This request was denied. The deposition was ordered for November 6th, 2003 at the offices of Defendant's counsel.

Plaintiff, whose basis of claim was a successful previous action, sought to limit discovery.

> PLAINTIFF: "Can I get or I'm respectfully requesting the then some sort of limitation on this deposition, that we don't relitigate these issues." A-43 lines 6-8.
>
> COURT: "And I am telling you now, on the record, that you must answer questions, except questions that as for privileged information, meaning information about things you've discussed with your doctor, your clergy or your attorney." A-44. (Lines 18-22). The Court then also directed pro se litigant "There are no questions you do not have to answer." A-50 (Lines 13-15.)

Court ordered Defendant's counsel, a total of four times, to call the Court on the day of deposition if Plaintiff refused to answer any

question. (A 37, Lines 1-4, A 45, Lines 11-18, A 46, Lines 9-12 and A 48, Lines 18-21).

When Plaintiff inquired if she would likewise be allowed to call Magistrate, Plaintiff received the following response:

> COURT: "You'll both be together, and it's not as if he's going to bar you from making the all, because he'll be on the line. But, if I hear his question and I say it's proper and I rule against you, I'm not going to take five calls in one day, Plaintiff. I'm here to do business of the Court. I'm not here to babysit people who are bringing their cases..." (A 49, Lines 17-23)

Court three times advises defense counsel to use Federal Express (A 46, Lines 21-23, A 48, Lines 1-3 and A 50, Lines 1-2):

> COURT: "So, either you cooperate or you don't cooperate. That's on you. Either you get your mail where you're suppose to get your mail or you don't. That's on you. If he sends it, that's all he needs to do, and that's why I'm telling him to send it with a tracking slip." A49-A50 (lines 23-2)

Court further admonished Plaintiff, "This is not a game.... You're permitted to proceed, but you are not permitted to try to waste anybody's time." A-50. Lines 23-25.

Plaintiff did not receive mandatory conference to limit or determine the scope of discovery in accordance with FRCP Rule 26(f)(2).

Plaintiff then received Defendant's Answer bearing a New York City postmark dated September 18, 2003.

Plaintiff could now only contest Magistrate's deposition order by a motion to EDNY District Judge Raymond Dearie.

The order for deposition was filled out on a court form, was not a written order issued or served by the court to Plaintiff. It remained a bench order. Plaintiff's motion for reconsideration to Judge Dearie was promptly denied, no more then the day after it was filed.

Plaintiff stated in her objection that she thought the prompt rejection was because deposition so ordered was not reduced writing or otherwise served to Plaintiff.

Upon EDNY's Fed Ex service of a written deposition order dated October 23, 2003 for deposition in defense counsel's office on November 6, 2003 and threatening sanction of Plaintiff.

Plaintiff filed a motion for reconsideration with stay differing in form and substance from first, raising new arguments with evidence and information previously unavailable with the district judge.

With motion with stay pending before the district court, Plaintiff contacted counsel ahead of for a mutual adjournment of November 6, 2003, deposition pending decision, on her motion for reconsideration with stay. Defendant wrote the court same day declaring Plaintiff canceled deposition pending resolution of motion.

Via a letter written to Magistrate, on November 13, 2003 Defendant was granted an adjournment to deposition scheduled for December 8, 2003, pending resolution of motions.

District Judge Dearie denied Plaintiff's motion for reconsideration with stay November 14, 2003 and referred matter to Magistrate for Report and Recommendation.

To comply with Federal Rules of Appellate Procedure Rule 4(a)(1), Plaintiff filed notice of appeal to the Second Circuit Court of Appeals ("Second Circuit") Judge Dearie's Order denying her motion for reconsideration denied on November 14, 2003.

The notice of appeal was lost by the court, as is noted on docket sheet. The notice of appeal for the day the original notice had been received by the court, November 25, 2003, the same day as was docketed district judge's order for report and recommendation from magistrate, in January 2004.

According to docket sheet rather then the notice being held in court file pending final judgment, it was sent to EDNY District Judge Dearie, who dismissed it Plaintiff's Notice of Appeal to Second Circuit, January 14, 2004 further rendering notice could not be then filed although, with note from clerk, docketed for November 25, 2003; and admonished Plaintiff she would be sanctioned if she continued to "litigate in this manner," without identifying to a pro se litigant what "this manner" was.

Plaintiff's right to appeal district judge's order upholding discovery, by now, the thirty days required by Federal Rules of Appellate

Procedure ("FRAP"), having expired, Plaintiff filed notice of appeal to the Second Circuit on Judge Dearie's January 14, 2004 order referencing it, without which Plaintiff did not have an appealable deposition order.

This notice of appeal was neither kept in court file pending final decision in the instant FDCPA action but sent on to the Second Circuit, which appeal was then dismissed.

Deposition remained adjourned with no further orders of deposition by the court.

Transcript of the October 8, 2003 initial conference was made by the court; without examination by Plaintiff. Magistrate issued a Report and Recommendation dated April 1, 2004 recommending dismissal.

Plaintiff filed written objection to the Report and Recommendation. The District Court adopted the Report and Recommendation by Order of the District Court dated May 21, 2004. A Final Judgment was issued on May 24, 2004 by Judge Dearie and filed May 26, 2004 dismissing Plaintiff's complaint with prejudice for failing to appear for deposition, which scheduled deposition for December 8, 2003 was still adjourned with no other date ordered by the EDNY.

On June 24, 2005, Second Circuit rejected Plaintiff's appeal filed by counsel.

To date, Lawrence P. Defendant has yet to comply with the order of Hon. Joan Kenney of New York City Civil Court, New York, County.

REASONS FOR GRANTING WRIT

There is no other court to repair to for justice.

This court has a sworn duty to protect the Constitution and to enforce those protections for all of its citizens.

That even one citizen should be denied fundamental rights, is, in and of itself, reason for this Court to grant certiorari.

There is no statute or case law from any federal court, to support a federal deposition order into facts and issues established in a previous federal action, or a state court action.

Debt collection practices affect the entire nation.

That such procedure can be entirely upheld at a circuit level, it is the imperative of this Court needs to address it for all federal courts.

There is no statute, or case law from any federal court, to uphold a federal court order directing ex parte communications from a party's counsel.

There is no statute or case law from any federal court, to uphold a deposition order for beyond "what is relevant to claim or defense," or, of "any matter relevant to the subject matter involved in the action."

Fourth Amendment rights are at issue for the entire nation.

Access to the court is a due process right.

ARGUMENT

I. RULE 26(b)(1) REQUIRES DISCOVERY ORDER "FOR GOOD CAUSE."

Defendant's papers show no attempts were made to arrange for a voluntary deposition process with Plaintiff.

As set forth below, Defendant's Answer and Notice of Deposition said to accompany it, was served September 18, 2003, three weeks after it had to be served in this action.

Allowing a week for mail from New York City to Colorado, as of September 25, 2003 Plaintiff was en route to New York for October 8, 2003 conference.

Plainly, had Defendant served Answer, or said notice in accordance to Federal Rules of Civil Procedure, Plaintiff could have opposed or made application to the court for an order limiting discovery under FRCP Rule 26(b)(2).

On the record made at of initial conference, Defendant did not make an oral application to take deposition.

Rule 26(b)(1) provides, "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

The Supreme Court has instructed time and again that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 US 249, 253-54 (1992).

"For good cause," being a key in element in court ordered discovery in limiting courts from simply making there own proclamations and decrees.

In this action, there was no "good cause," no voluntary arrangements were attempted first by Defendant; Plaintiff had no notice Defendant even desired deposition, because Defendant's notice of deposition was served upon Plaintiff with an untimely Answer, as set forth below; Plaintiff was denied opportunity to address the issue of deposition before the court, or otherwise obtain an order limiting scope pursuant to FRCP Rule 26(b)(2); Defendant did not raise a cognizable defense under FDCPA 15 U.S.C. §1692k(c) in Answer as set forth below (forgetting when it was served); and most especially that Plaintiff's basis of claim under FDCPA was the record of a prior proceeding. Wherein, Defendant, not licensed to collect debt in New York City, (New York City Code §20-490) as established in NYCCC in NYC 83622/00, seized Plaintiff's bank accounts and the manner thereof, and all defenses thereto was the substance of a previous action.

What distinguishes Plaintiff's claim is not that Defendant's alleged actions, or lack thereof, violated FDCPA; but how Defendant's actions as set forth in prior proceeding, exhibited in Complaint, violated FDCPA.

Further, and most certainly, there is no "good cause" for an order for deposition that pointedly refuses to limit discovery even to statute "relevant to claim or defense," or, of "any matter relevant to the subject matter involved in the action."

In FDCPA there is only one defense, and waived if not pleaded (Rule 8(c)).

Deposition order without "good cause" or due process under the Fifth Amendment and Fourteenth Amendment constitutes an illegal search and seizure under the Fourth Amendment.

II. FEDERAL COURTS DO NOT HAVE JURISDICTION TO ORDER DISCOVERY BEYOND STATUTORY LIMITATIONS OF RULE 26(b)(1).

Congressional intent in amended Rule 26(b)(1) in 2000 was to eliminate "fishing expeditions," harassment and to protect Fourth Amendment rights. "The Supreme Court has explained that 'we begin with the understanding that Congress" says in a statute what it means and

means . . . what it says there,'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)),

FRCP Rule 26(b)(1) limits discovery to "regarding any matter, not privileged, that is relevant to the claim or defense," and "[f]or good cause" court ordered discovery to "any matter relevant to the subject matter involved in the action."

Federal law thus prohibits the District and Second Circuit's ordered disclosure in this action to such questions what size Plaintiff is; what sort of men, if any, appeal to pro se Plaintiff, etc.

Magistrate's deposition order upheld by District Court and Second Circuit patently does not.

Plaintiff was denied mandatory conference under Rule 26(f)(2).

If only for an appealable order, Plaintiff's only recourse therefore was to then file a motion for reconsideration to the district judge, and without a written order or proof thereof and its failure to limit deposition.

Fourth Amendment guarantees the right to privacy. Failure to uphold that right in civil cases constitutes an illegal search and seizure. "The Amendment protects the people from unreasonable searches and seizure of 'their persons, houses, papers, and effects.' This language surely cuts against the novel holding below... But our cases are to the contrary...even though no search within the meaning of the Amendment has taken place." *Soldal v. County of Cook United States* 506 US 56 (1992).

Thus, violating Plaintiff's rights under the Fourth Amendment violates her due process rights under the Fifth Amendment and Fourteenth Amendment.

That the subject of this federal action was defendant's illegal seizure of personal property held within a financial institution; and, especially that, although NYC 91440 02 filed by Lawrence P. Wolf, Esq., the Defendant in this action, had been dismissed against Kendra Musgrave with prejudice, judgment therein which Kendra Musgrave was not a party to, had by October 8, 2003 been enforced against Kendra Musgrave, with liability thereunder for $20,445.35, (See Musgrave v. Hoyos United States Supreme Court 04-1582), Defendant in this action,

Lawrence P. Wolf, could have then executed upon any and other of personal property, if any, of Kendra Musgrave Plaintiff in this action, if he only could discover it. Court's ordered deposition directly put Plaintiff in harm's way and for no "good cause."

III. IT IS UNCONSTITUTIONAL FOR A CIRCUIT COURT TO UPHOLD ORDERS FOR EX PARTE COMMUNICATIONS WITH A PARTY'S COUNSEL.

Lest there exists any question that discovery order was to exceed federal parameters, the court then repeatedly ordered Defendant's counsel, a total of four times, to call the Court on the day of deposition when Plaintiff refused to answer a question. (A 37, Lines 1-4, A 45, Lines 11-18, A 46, Lines 9-12 and A 48, Lines 18-21).

The transcript is void of even the suggestion that Plaintiff should be on the line with counsel when counsel called Magistrate.

No limitation is placed upon the number of times defense counsel may contact the Magistrate by phone.

Federal statute and due process strongly prohibit ex parte communications with the federal bench.

IV. STATE SOVEREIGNTY AND RE JUDICATA AND COLLATERAL ESTOPPEL BARS FEDERAL COURTS FROM DISCOVERY ON FACTS AND PREVIOUSLY ESTABLISHED IN A STATE COURT PROCEEDING.

In Defendant's answering affidavit to Plaintiff's order to show cause granted in its entirety by NYCCC was that he was the party who had so seized Plaintiff's bank accounts. Defendant was also whom the contempt order was issued against. He testified as a party to the contempt hearing which was held. He was represented by his own counsel at that hearing.

All that remained then for the case below was to apply the law (in this case the FDCPA) to the already established facts and to set damages.

The damages under FDCPA are statutory and that which was actual as a result of alleged violation of FDCPA. The actual damages therefore submitted with claim, were those submitted to NYCCC wherein there was opposition or discovery request thereon.

As Magistrate stated on the record at initial conference, facts found by State Courts are not subject to review here or in the District Court. The Civil Court of the City of New York, had already twice ruled in favor of Plaintiff, holding (on November 15, 2002) that "...there was no legal basis..." to restrain Plaintiff's accounts and holding (on October 7, 2003) that Defendant (attorney for the petitioner in that case, personally the Defendant in the United States District Court and personally the Appellee herein) "...engaged in sharp practice..." and further that "To proceed to restrain a bank account of a person whom Defendant knew was not responsible to pay use and occupancy, is more than a little unseemly." Defendant was further held to be in contempt of Court and fined.

Any discovery ordered into the facts established and ruled upon by a state court violates United States Constitution, Article 4 Section 1 wherein the Decisions and Orders of the Civil Court are entitled to full faith and credit in the US District Court.

Even if, arguendo, the courts of New York State somehow decide that altering court documents to obtain bank accounts of non-parties is perfectly legal, the fact that it happened, how it happened, etc., cannot be disputed in a federal court.

The law of the case is just that "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed. 2d 767 (1979). Plaintiff made claim for her bank accounts, *inter alia*, and Defendant made his defense in NYCCC. The whys and wherefore, and therefore all discovery relevant thereto, cannot be orderd by a federal court.

Such facts having been previously determined by a Court of competent jurisdiction, the doctrine of collateral estoppel applies to preclude Defendant from relitigating his defense thereby taking discovery upon these facts before the United States District Court for the Eastern

District of New York. *United States v. Moser*, 266 U.S. 236 (1924); *Stone v. Williams*, 970 F.2d 1043 (2nd Cir., 1992).

In the case of *Hernandez v. Goord*, the United States District Court for the Southern District of New York held:

> "Under New York law, issue preclusion applies when (a) the issue of law or fact has necessarily been decided in the prior action and is decisive of the present action and (b) there was a full and fair opportunity to contest the issue. See Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349, 690 N.Y.S.2d 478 (1999); see also Schwartz v. Public Admin., 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955 (1969)." *Hernandez v. Goord*, 312 F.Supp2d 537, 543 (S.D.N.Y., 2004)

Defendant's restraining of Plaintiff's bank accounts without legal basis and his contemptuous disregard of an Order to return the money, *inter alia*, and release the accounts were necessarily decided (against Defendant) in the prior action and were also unfair debt collection practices in the federal action appealed from. The contempt order was issued after a hearing at which Defendant was represented by counsel and offered his testimony. Prior to initial conference ordered by Magistrate Bloom, Defendant was held in contempt by a state court. This should have been found dispositive, as least as far as liability was concerned. FRCP Rule 56(c) specifically allows the District Court to grant summary judgment on this issue of liability even if there was a genuine issue as to the amount of damages. The doctrine of collateral estoppel also applies in Federal District Courts:

> "In New York, the doctrine of collateral estoppel 'prevents a party from relitigating an issue decided against that party in a prior adjudication.' Curry v. City of Syracuse, 316 F.3d 324, 331 (2nd Cir. 2003) (quoting Fuchsberg & Fuchsberg v. Galizia, 300 F.3d 105, 109 (2nd Cir. 2002)); accord Ryan v. N.Y. Tel. Co., 62 N.Y.2d 494, 500 (1984).

> Collateral estoppel 'may be invoked to preclude a party from raising an issue (1) identical to an issue already decided (2) in a previous proceeding in which that party had a full and fair opportunity to litigate.' Curry, 316 F.3d at 331(citations omitted); accord Vishipco Line v. Charles Schwab & Co., 2003 WL 1345229 at *3 (S.D.N.Y. Mar. 19, 2003); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349 (1999).
>
> Further, 'the issue must have been material to the first action or proceeding and essential to the decision rendered therein, and it must be the point actually to be determined in the second action or proceeding.' Ryan, 62 N.Y.2d at 500-01(internal citations omitted); accord Wight v. Bankamerica Corp., 219 F.3d 79, 88 (2nd Cir. 2000). Satterfield v. Pfizer, Inc., (S.D.N.Y. July 13, 2005, Wood, J.), citing Curry v. City of Syracuse, 316 F.3d 324, 331 (2nd Cir. 2003); Fuchsberg & Fuchsberg v. Galizia, 300 F.3d 105, 109 (2nd Cir. 2002); Ryan v. N.Y. Tel. Co., 62 N.Y.2d 494, 500 (1984); Vishipco Line v. Charles Schwab & Co., 2003 WL 1345229 at *3 (S.D.N.Y. Mar. 19, 2003); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349 (1999); Wight v. Bankamerica Corp., 219 F.3d 79, 88 (2nd Cir. 2000).

It is clear that it is New York's law of collateral estoppel which the Federal Courts must apply when determining the preclusive effect of a New York Court's Order. *Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 109 (2nd Cir. 2002); *Curry v. City of Syracuse*, 316 F.3d 324, 331 (2nd Cir. 2003). Even more clear is *Wight v. Bankamerica Corp.*, a case arising out of the collapse of Pakistan-based BCCI and the guilty pleas resulting therefrom. *Wight v. Bankamerica Corp.*, 219 F.3d 79, (2nd Cir. 2000). In that case the Court holds: "'[T]he preclusive effect of a state court determination in a subsequent federal action is determined by the rules of the state where the prior action occurred.'" *Wight v. Bankamerica Corp.*, 219 F.3d 79, 87-88 (2nd Cir. 2000), citing *In re: Sokol*, 113 F.3d 303, 306 (2nd Cir. 1997); 28 U.S.C. § 1738The pendency of an appeal does not deprive the prior rulings of their preclusive effect. *Disorbo v. Hoy*, 343 F.3d 172 (2nd Cir., 2003).

By contrast only eight states do not afford preclusive effect pending appeals, and in the case of California this is by statute. *Campbell v. Lake Hallowell*, 157 Md. App. 504, 522-23 (& n.3), 852 A.2d 1029 (2004). Thus New York is on solid ground in holding that preclusive effect applies regardless of the pendency of any appeal.

Decisions and Orders have preclusive effect, not just judgments. Orders sanctioning attorneys for misconduct have been recognized as having collateral estoppel effect. *In the Matter of Osborne*, 1 A.D.3d 31, 766 N.Y.S.2d 33 (1st Dept 2003). In that case: "In April 2001, the Departmental Disciplinary Committee initiated a proceeding against respondent, pursuant to the doctrine of collateral estoppel, based on the findings made in three unrelated civil cases in which monetary sanctions were imposed on him for pre-trial misconduct that exhibited disdain for the court." *In Matter of Capoccia*, 272 A.D.2d 838, 847 an attorney was held to be collaterally estopped due to multiple sanction orders against him for presenting 'canned' defenses in collection cases regardless of the facts of the particular case. Capoccia is extremely relevant to this case. In that case, Andrew F. Capoccia, Esq., was sanctioned for misconduct in defending collection actions and he was held to be collaterally estopped from denying that he did so. In this case Defendant was sanctioned for (among other things) misconduct in knowingly and unlawfully seizing property held in a financial institution, by someone he knew was not liable for the debt. It is the flip side of the same coin. The goose and gander analogy applies. The same standard must apply to collection attorneys as to attorneys who defend against collection cases.

Nor is the preclusive collateral estoppel effect of contempt orders limited to attorney discipline. *Matter of Sharon Towers, Inc., v. Bank Leumi Tr. Co.*, 250 A.D.2d 509, 673 N.Y.S.2d 138 (1st Dept 1998). The Appellate Division clearly recognized that such orders have collateral estoppel effect, regardless of the fact that they did not hold the limited partnership to be estopped due to the contempt order against its general partner. *Matter of Sharon Towers, Inc., v. Bank Leumi Tr. Co.*, 250 A.D.2d 509, 673 N.Y.S.2d 138 (1st Dept 1998).

As stated by the New York State Court of Appeals: "...where it can be fairly said that a party has had a full opportunity to litigate a

particular issue, he cannot reasonably demand a second one." *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969).

In later motions Plaintiff appears to have used the term Rooker-Feldman, apparently set on the wrong course at the initial conference by Magistrate, and perhaps as an effort to persuade the court her FDCPA action did not violate Rooker-Feldman, when Plaintiff should have used the term collateral estoppel, but a pro-se plaintiff should not suffer for such imprecise nomenclature. The facts necessary to determine the question of liability, at least, were already established in the Civil Court of the City of New York. They could be 'discovered' most expediently, by simply reading the contempt order.

V. FEDERAL COURTS DO NOT HAVE JURISDICTION TO ORDER DISCOVERY BEYOND RULE 26(b)(1), SPECIFICALLY DISCOVERY RELEVANT TO A DEFENSE THAT WAS NEVER RAISED.

Pursuant to 15 U.S.C. §1692k(c), in an FDCPA action there is only one defense – which, Defendant did not raise in his Answer. An affirmative defense is waived if not pleaded. (FRCP Rule 8(c)).

General denial that actions established in a state court, then violated FDCPA; or acting as an agent for principle is not a cognitive defense under FDCPA. A review of the records from the Civil Court when compared with Defendant's Answer (forgetting for a moment any issue of service of the answer) shows that Defendant did not properly raise a bona fide error defense pursuant to 15 U.S.C. §1692k(c), which states:

> "A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. §1692k(c).

The answer does not even allege that any procedures were maintained or reasonably adapted to avoid such errors. Thus this defense is not properly raised.

VI. PLAINTIFF HELD SUMMARY JUDGMENT AS A MATTER OF LAW; SUBSEQUENTLY DISCOVERY ORDER VIOLATED PLAINTIFF'S FEDERAL RIGHTS AND CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

"Other" being a telling word, in responsive papers filed with the court, Defendant's counsel stated to the district court, "The only other legal document in this case that is dated September 15, 2003 is the defendant's affidavit in opposition to the plaintiff's previous motion...According to its weight, this document required five or six postage stamps... The envelope post marked September 18, 2003 contains only two stamps... During this period of time there was no other written communications between plaintiff and me concerning this case."

Defendant's answer is five pages long. The Notice of Deposition said to accompany it is 4 pages long. Defendant's opposition to Plaintiff's initial motion is 37 pages long, inclusive of exhibits, exhibit labels and legal back, which could not be made to fit in a white monarch envelope bearing a September 18, 2003 postmark, with roughly 60 cents (2 stamps) in 2003 postage to Colorado. This postmark is well after the August 25, 2003 filing date for the answer and would thus indicate that the answer was not served prior to its filing as required by FRCP Rule 5(d) and was not served within 20 days as required by FRCP Rule 12(a)(1)(A).

Plaintiff motioned the court that Plaintiff had both envelopes from Defendant's counsel which contained Defendant's answer and notice of deposition and, according to defense counsel "[t]he only other legal document in this case that is dated September 15, 2003" Defendants opposition papers (sent in a manila envelope containing the multiple stamps) and too heavy to be mailed for the amount of postage (two stamps) to reach Colorado or even New York City, which appears on the monarch envelope.

Defendant's counsel admitted that this envelope proves that something was sent to Plaintiff at that time, and postulates that this is a letter to the Judge, but that letter had enclosures of the moving and opposing papers and thus would have been both too large for the envelope and too heavy for the postage. The courts below nonetheless

refused to even consider the idea that answer was not served as required by the FRCP and that thusly, Defendant was in default. The refusal was not only erroneous but a blatant violation of Plaintiff's due process rights under the Fifth Amendment and Fourteenth Amendment.

FRCP Rule 12(a)(1)(A) requires that the answer be served within 20 days of service of the summons and complaint. Papers also must be served before filing pursuant to FRCP Rule 5(d).

With all due credit to Johnnie Cochran, Esq., it would be a simple matter to see which hand fits that glove. The Court below could have done it. The Court of Appeals could have. If there were any questions as to using a monarch envelope from the Court's own supply room then the actual envelope in question could have been provided at an open hearing on the matter, if necessary. I know of no reason why the same could not still be done. Thirty-seven pages just does not go into an envelope that size. Nor, could roughly sixty cents in postage carry it to Colorado.

To vacate the rightly ensuing default judgment against Plaintiff, Defendant must then demonstrate a meritorious defense. *State St. Bank & Trust v. Inversiones Errazuriz*, 374 F.3d 158 (2nd Cir., 2004); *Sony Corp. v. Elm State Electronics, Inc.*, 800 F.2d 317 (2nd Cir., 1986); *I.L.G.W.U. Nat. Retirement Fund v. Grey*, 986 F. Supp. 816 (S.D.N.Y. 1997); *State v. Green*, (04-4070 CV, 2nd Cir. August 18, 2005).

As the Second Circuit stated:

> "Although the magistrate judge found that the defendants' failure to respond to the complaint had not been wilful, he nonetheless determined that their motion should be denied because they had failed to establish any meritorious defense or counterclaim and had failed to demonstrate that State Street Bank would not be prejudiced by the vacatur of the default judgment." State St. Bank & Trust v. Inversiones Errazuriz, 374 F.3d 158, 165 (2nd Cir., 2004).

then held:

> "We need not evaluate whether the vacatur of the default judgment would subject State Street Bank to prejudice because we have concluded that the defendants failed to establish a meritorious defense; the absence of such a defense is sufficient to support the district court's denial of the defendants' first Rule 60(b) motion. See Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 244 (2d Cir. 1994). Cf. Sony Corp. v. Elm State Elec., 800 F.2d 317, 320-321 (2d Cir. 1986) (affirming the denial of a motion to reopen a default after determining the defendants failed to demonstrate that they possessed a meritorious defense). State St. Bank & Trust v. Inversiones Errazuriz, 374 F.3d 158, 174 (2nd Cir., 2004).

The Court below also failed to properly consider or grant Plaintiff's motion for summary judgment.

In the face of which ordering deposition violates Plaintiff's rights under the Fifth Amendment and Fourteenth Amendment.

VII. IT IS UNCONSTITUTIONAL FOR A FEDERAL COURT TO GIVE LEGAL ADVICE OR LEGAL STRATEGY TO A PARTY'S COUNSEL.

In the context of Plaintiff's assertions that she was not served with an Answer, Magistrate three times advises defense counsel to use Federal Express. (A 46, Lines 21-23, A 48, Lines 1-3 and A 50, Lines 1-2) and even states why, in the process somewhat making defense

counsel's legal argument for him, berating Plaintiff for Defendant's apparent lack of service of Answer:

> COURT: "So, either you cooperate or you don't cooperate. That's on you. Either you get your mail where you're suppose to get your mail or you don't. That's on you. If he sends it, that's all he needs to do, and that's why I'm telling him to send it with a tracking slip." A49-A50 (lines 23-2)

Contrast this with the lack of any assistance to pro se Plaintiff, not even advising Plaintiff of where to seek legal representation or inquiring what services she might be eligible for. The Court insultingly told the pro-se Plaintiff that it was not here to "babysit" her but the Court had ample time to advise defense counsel on how he should best proceed.

VIII. FEDERAL COURTS DO NOT HAVE JURISDICTION TO ORDER VIOLATION OF COURT RULES OR STATE REGULATIONS

EDNY's records showed Defendant's counsel was not admitted to practice in EDNY. Local Rule 1.3 requires an attorney to be admitted to EDNY before appearing. Defendant's counsel was not admitted to EDNY prior to appearing on October 8, 2003 when order for deposition was given. Second Circuit thus upheld a federal court order to violate district court rules and state regulations.

The Code of Professional Responsibility advises attorneys, in pertinent part: "To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar." The Lawyer's Code of Professional Responsibility, as adopted by NYSBA 1/1/1970 and as amended effective 1/1/2002, ("LCPR") EC 1-2. The disregard of the issue of defense counsel's admittance to EDNY, ignores this Ethical Consideration, as well as Disciplinary Rule 3-101(B), which requires that: "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." LCPR Canon 3 states: "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law." As LCPR Canon 3 applies to Judges and Magistrates as well as other attorneys, the Court below would be expected to assist and

prevent the unauthorized practice of law by someone whose practice in that jurisdiction may have been unauthorized. While the Canons do not have the bite of the Disciplinary Rules,: "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived." LCPR Preliminary Statement. LCPR Canon 9 also expects attorneys to avoid even the appearance of professional impropriety.

No deposition should not have been allowed to go forward until such time as Mr. Moraco was duly admitted to the bar of EDNY. *Stevens v. Gertz*, 103 F. Supp. 760, 762 (W.D. Mich. 1952).

Ruling otherwise not only violates state sovereignty under 4 Section 1 of the Constitution, but by violation of law, violates the Fifth Amendment and Fourteenth Amendment, but for discovery then violates Fourth Amendment guarantees.

IX. POINT II: ORDERING UNILATERAL DISCOVERY VIOLATES PLAINTIFF'S RIGHTS TO DUE PROCESS.

District Court determinations on summary judgment are reviewed de novo.

The Court below essentially refused to entertain Plaintiff's motion for a default judgment.

The Court below permitted Defendant a deposition of Plaintiff, yet when Plaintiff sought the opportunity to cross-examine (i.e., depose, and a pro-se litigant should not be penalized for getting this phraseology mixed-up) in regards to the alleged service of the answer, she was denied that right. Nor was Plaintiff informed of any right to depose Defendant or anyone else. Discovery in this case appeared as a one-way street. Unilateral discovery is unfair and should not be permitted. *White v. American Tobacco Company*, 125 F.R.D. 508 (Dist of Nevada, 1989).

"Reciprocal discovery is a two-way street." *U.S. v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987); *U.S. v. Giampa*, 904 F. Supp. 235, 291 (N.J. 1995). "Mutual knowledge of all the relevant facts gathered is

essential to proper litigation. To that end either party may compel the other to disgorge whatever facts he has in his possession." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L. Ed. 451 (1947). Put even more plainly "Discovery, in other words is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L. Ed. 451 (1947).

"Issues cannot be resolved by a doctrine favoring one class of litigants over another." Schlagenhauf v. Holder, 379 U.S. 104, 113 (1964).

It is fundamentally unfair to award discovery to one party while denying it to the opposing party, and a denial of Plaintiff's rights to due process under Fifth Amendment and Fourteenth Amendment.

Most especially when the hearsay contentions of someone at the offices of defense counsel were unquestioningly accepted while Plaintiff's contention of later service of the answer was dismissed despite the white monarch envelope with the September 18, 2003 postmark.

X. WHERE APPEAL IS AS OF RIGHT, A DISTRICT JUDGE'S DISMISSAL OF NOTICE OF APPEAL ON OWN ORDER IS UNCONSTITUTIONL.

District Judge Dearie's order cited the Notice of Appeal, filed in January (although docketed for November 25, 2003 noting it had been lost by the court) and threatened sanctions. Imposing onerous conditions denies access to the court. *Ex Parte Hull*, 312, U.S. 546, 548-49 (1941).

XI. THE DISMISSAL OF PLAINTIFF'S CASE WAS UNDULY HARSH UNDER THE CIRCUMSTANCES AND WAS AN ABUSE OF DISCRETION.

Dismissal of Plaintiff's Complaint is not only especially harsh, but absurd under the circumstances of this action.

Defendant in this action never once argued that Plaintiff refused a voluntary discovery process, or mutual sharing, or ever petitioned the court for an order for discovery.

Yet, reading the Record of the proceedings below reveals that Plaintiff, though Plaintiff may have disagreed with the Court's ordering

discovery, appears willing to attend a deposition. Plaintiff continually and repeatedly inquires into the scope of discovery that will be permitted. Most of the transcript from page 18 onward (A 44-A 50) is concerned with the scope of the deposition. Plaintiff inquires as to what questions she will be required to answer.

There would be no need to inquire into the details of the deposition if Plaintiff was planning on not attending it.

In regard to Plaintiff's willingness to be deposed, it must be noted that when Defendant's made an oral application at the conference that the deposition be conducted at the Courthouse, Plaintiff joined in that application. The entire discussion is too lengthy to reproduce here, but Plaintiff's reaction to the oral application of Defendant's counsel to have the deposition at the Eastern District Courthouse was: "I'm okay with coming to Brooklyn, if its easier for Mr. Moraco. I don't have an issue with that." (A 37, Lines 10-12). Not giving up on this idea Plaintiff later added: "I have no qualms coming here to Brooklyn, if you don't mind, your Honor." (A 37, Lines 19-20).

In *Salahuddin* the dismissal of the plaintiff's case was reversed. The Court held that:

> "A court order under Rule 30(a) was in effect when Salahuddin's deposition was taken but that order did not specify what matters could or could not be inquired into at the deposition or what procedures were to be followed if a dispute arose over the manner of conducting the deposition." *Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2nd Cir 1986).

In overturning the dismissal order in Salahuddin the Court of Appeals for the Second Circuit took note that the District Court "...did not examine the question of whether lesser sanctions would be sufficient to remedy the improper behavior." Salahuddin v. Harris, 782 F.2d 1127, 1131 (2nd Cir 1986). Defendant was effectively granted unlimited discovery and Musgrave was instructed to answer whatever was asked, unless privileged. Plaintiff was expected to walk blindly into her adversary's attorneys' offices and answer whatever questions they wanted to ask her

The swift application of the extreme sanction of dismissal with prejudice was unnecessary, harsh and an abuse of discretion.

XII. SECOND CIRCUIT'S DECISION IS DENIED ACCESS TO COURT.

Second Circuit's decision which states "The court explained to Musgrave that irrelevance per se was not a ground for refusing to answer a question" is factually incorrect. As transcript and record reflects, "relevance" was not a word ever used by the court, nor a vaguely referenced concept.

Second Circuit has a sworn duty to protect the constitutional rights of all those within the jurisdiction of its federal court.

Second Circuit showed a marked failure to address the statutory and constitutional requirements raised by Plaintiff, the order for discovery and how it was derived, but rather,

> "The Second Circuit's decision based on a consistent attitude on Plaintiff's part that no determination of the Magistrate Judge or the District Court was decisive or binding, that every issue in the case was open to continual review on the same repeated grounds, and that she was entitled to suspend court discovery orders simply by appealing them repeatedly. This attitude plainly went beyond any confusion about the law such as a good faith pro se litigant might have, and instead reflected a refusal to recognize the court's authority."

Second Circuit's finding "that every issue in the case was open to continual review on the same repeated grounds," is factually incorrect.

Plaintiff was not even issued a summons in this action as is self evident by the docket. Rather than addressing that there court ordered deposition without Plaintiff's prior knowledge, including any oral application made by Defendant at initial conference and thus Plaintiff was denied any argument thereto; Plaintiff was told her motion for summary judgment or in the alternative a default was "going nowhere;" that court ordered deposition and complete lack of parameters thereon October 8, 2003, without reducing it to a written order; and further denied mandatory conference (FRCP Rule 26(f)(2)); that written order was issued thereafter and thereafter, denied all else, Plaintiff filed motion for reconsideration with stay, differing considerably in form and substance to district judge, if

only for an appealable order; that Plaintiff might have contacted counsel and believed she had a mutual adjournment for application to the court, pending resolution; or, that if Plaintiff failed to "recognize the authority of the court" Plaintiff would filed a motion for reconsideration but would have simply failed to appear at scheduled deposition; or, that December 8, 2003, was adjourned November 13, 2003 by Magistrates granting the Defense counsel's request in a letter written to the court, for adjournment pending resolution on motions, the day before District Judge Dearie's November 14, 2003 order thereon and that deposition remained adjourned for the rest of the action; and which, notice of appeal thereon to Second Circuit was subsequently misplaced by the court, then dismissed by the very judge whose order it was; Second Circuit then penalizes Plaintiff therefore and rather than examining court's deposition order for "good cause" and, for discovery to "relevant to claim or defense" under Rule 26, or, even that the blatant partiality of the court and court's open hostility to Plaintiff might have denied Plaintiff due process, or that even in the face of which, Plaintiff remained respectful to the court.

The exercising of federal and constitutional rights, protecting such rights, or repairing for violation of such rights should not then become the source of new violations thereto. *New York Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) quoting The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721-722 (1735).

Further, pro se Plaintiff, thus, was so sanctioned by Second Circuit for failing to appear for deposition while she had a pending motion for reconsideration with stay before the court. The only other court ordered deposition date was adjourned by the court at request of defense. Second Circuit's decision is denied access to the court.

Further, even if, arguendo, pro se Plaintiff had repeatedly motioned for reconsideration and appealed on the "same grounds" does not alleviate Second Circuit from looking at the substance thereof, and, especially when federal and constitutional rights and doctrine are at issue. "[T]he right of access to the courts here at issue, infringements of which are subject to heightened judicial scrutiny. See, *e.g., Dunn* v. *Blumstein*, 405 US 330, 336-337." *Tennessee v. Lane*, 541 U.S. 509 (2004).

"Meaningful access to the court is due process right to "a reasonably adequate opportunity to present claimed violations of

fundamental rights to the court." *Bound v. Smith* 430 U.S. 817, 825, 94 S.Ct. 2963 (1977);

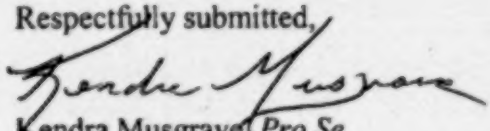
The extent of access to the court in this FDCPA action the court need afforded to Plaintiff was but to read Complaint, the NYCCC decision exhibiting it and documental proof of when it was served; Defendant's Answer and documental proof of when it was served, then make a ruling under FDCPA. Denied that, Plaintiff was denied by the courts fundamental rights all other federal and fundamental rights.

What distinguishes this FDCPA action is not whether or when Plaintiff was denied due process in this federal action, but, rather when Plaintiff ever received due process.

CONCLUSION

The judgments of the courts below should be overturned, along with the Orders upon which it is based, the Report and Recommendation rejected for summary judgment in favour of Plaintiff, for damages set forth therein, injunction as set forth therein, and this case should remanded in accordance with this Court's own rulings, for the reasons stated above.

Respectfully submitted,



Kendra Musgrave, *Pro Se*
9985 Appletree Place
Thornton, Colorado 80260
303-452-2854

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENDRA MUSGRAVE,

Petitioner(s),

□against□

LAWRENCE P. WOLF, ESQ.,

Respondent(s)

On Petition For Writ Of Certiorari to the
United States Court of Appeals
For the Second Circuit

APPENDIX

KENDRA MUSGRAVE
Pro Se
9985 Appletree Place
Thornton, Colorado 80260
303-452-2854

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of June, two thousand five.

PRESENT: HON. ROGER J. MINER
HON. CHESTER J. STRAUB,
Circuit Judges, and
HON. JOHN F. KEENAN,
District Judge.

KENDRA MUSGRAVE, No. 04-3798

Plaintiff-Appellant,

–v.–

LAWRENCE WOLF,

Defendant-Appellee.

Appearing for Plaintiff-Appellant: Michael Kennedy Karlson, New York, New York.

Appearing for Defendant-Appellee: Robert Moraco, Licoti, Bernstein & Moraco, PC, NewYork, New York.

On appeal from the United States District Court, Southern District of New York (Raymond J. Dearie, J).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THE DISTRICT COURT'S ORDER BE AND IT HEREBY IS AFFIRMED.

Plaintiff-Appellant Kendra Musgrave (" Musgrave") appeals from an order of the United

States District Court, Southern District of New York (Raymond J. Dearie, Judge), dismissing her

complaint pursuant to Fed. R. Civ. P. 37(b)(2)(C) for failure to comply with a court order regarding discovery. We assume the parties' familiarity with the facts, decision below, and ssues on appeal.

After apparently establishing in a state legal action that Defendant-Appellee Lawrence (" Wolf") wrongfully restrained funds of hers in connection with a
landlord/tenant proceeding against Musgrave's sublessor (in which Wolf was acting as the landlord's attorney),

Musgrave filed a federal action against under the Fair Debt Collection Protection Act concerning the same underlying events. The District Court referred the case to a Magistrate

Judge for discovery purposes. Although Wolf's answer was timely filed and recorded on the court docket, Musgrave claimed that she never received the answer, and moved for a default judgment or, in the alternative, summary judgment. She did not appear at the noticed deposition on September 24, 2003.

At a conference before the Magistrate Judge on October 8, 2003, the court indicated that Musgrave's motion for default judgment was meritless and that, given her decision to move for summary judgment, was entitled to depose her. The court asked Musgrave to indicate her availability so that the deposition could be scheduled in open court. Musgrave instead continued to argue, at length and over the court's protestations, that she should not have to undergo a deposition because Wolf's answer had not been timely served. Eventually,
Musgrave indicated that she would be available to appear at a deposition on November 6, 2003. She then requested a ruling narrowing the range of potential deposition questions. The court explained to Musgrave

that irrelevance per se was not a ground for refusing to answer a question, but that, if she believed Wolf's questions were exceeding the scope of the litigation, the parties could call the court for a ruling. Musgrave continued to object to the proposed deposition. The court became increasingly frustrated, and warned Musgrave that, if she did not appear for her deposition, she would be subject to sanctions under Federal Rules of Civil Procedure 37 and 16.

After the conference, Wolf served Musgrave with a notice of deposition, which the court endorsed. On the same day, October 15, 2003, Musgrave filed a motion for reconsideration, and informed Wolf that she would not be appearing for her deposition. Musgrave' s motion argued that she should be granted relief because: Wolf's answer had not been timely served; the Magistrate Judge lacked authority to order a deposition; and no discovery was necessary

because all relevant facts had been established in state proceedings. The District Court denied her motion, and the Magistrate Judge issued an order directing Musgrave to appear on November 6, 2003 and warning her that, should she fail to appear, "her case is subject to dismissal with prejudice pursuant to Rule 37(b)(2)(C)." On November 3, 2003, Musgrave filed a motion for reconsideration, repeating the arguments from her first denied motion. She informed Wolf that, as this motion was pending, she would not be appearing for the deposition. The deposition date passed, and Musgrave did not appear. Wolf moved for dismissal under Rule 37(b)(2)(C), and the court granted his motion. This appeal followed.

Rule 37, which concerns the discovery obligations of civil litigants, grants a district court "broad power" to impose sanctions, including dismissal, on parties who engage in abusive litigation practices. Friends of Animals, Inc. v. United States Surgical Corp., 131 F. 3d 332, 334 (2d Cir. 1997) (per curiam). While Rule 37 dismissal is a drastic remedy meant only for extreme circumstances, it "is warranted . . . where a party fails to comply with the court's discovery orders willfully, in bad faith, or through fault." John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 845 F. 2d 1172, 1176 (2d Cir. 1988) (and cases cited therein). Finally, although pro se litigants are afforded somewhat more latitude on procedural matters, "dismissal with prejudice may be imposed even against a plaintiff who is proceeding pro se, so long as a warning has been given that noncompliance can result in dismissal." Valentine v. Museum of Modern Art, 29 F. 3d 47, 50 (2d Cir. 1994) (per curiam).

We review a District Court's decision to employ the sanction of dismissal for abuse of discretion, bearing in mind the following factors:

[1] the duration of the plaintiff's failures, [2] whether [the] plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4]

whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard, and [5] whether the judge has adequately assessed the efficacy of lesser sanctions. Shannon v. General Elec. Co., 186 F. 3d 186, 193-94 (2d Cir. 1999) (quotation marks omitted).

Applying the principles set forth above, we find that the District Court did not abuse its discretion. A review of the record below reveals a consistent attitude on Musgrave's part that no determination of the Magistrate Judge or the District Court was decisive or binding, that every issue in the case was open to continual review on the same repeated grounds, and that she was entitled to suspend court discovery orders simply by appealing them repeatedly. This attitude plainly went beyond any confusion about the law such as a good faith pro se litigant might have, and instead reflected a refusal to recognize the court's authority. In light of the record, we find it reasonable to conclude, as the court did, that Musgrave was unlikely to comply in the future.

Finally, the court repeatedly warned Musgrave that her suit might be dismissed for failure to comply with its discovery orders.

We have considered all of Musgrave's arguments and find them meritless. Accordingly, the District Court's order is AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

_____ _____ BY
DATE

UNITED STATES EASTERN DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

KENDRA MUSGRAVE

JUDGMENT
03-CV-2511(RJD)

Plaintiff,

-against-

Lawrence P. Wolf, Esq.

----------X

An Order of Honorable Raymond J. Dearie, United States District Judge, having been filed on May 21, 2004, adopting the Report and Recommendation of Magistrate Judge Los Bloom, dated April 1, 2004, granting defendant's motion to dismiss plaintiff's complaint, dismissing plaintiff's complaint with prejudice pursuant to Fed. R. Civ. P. 37(b)(2)(c); it is

ORDERED AND ADJUDGED that plaintiff take nothing of the defendant; that the Report and Recommendation of Magistrate Judge Lois Bloom is adopted; that this judgment is hereby entered granting defendant's motion to dismiss plaintiff's complaint; and that plaintiff's complaint is dismissed with prejudice, pursuant to Fed. R. Civ. P. 37(b)(2)(c).

Dated: Brooklyn, New York
May 24, 2004

ROBERT C. HEINEMANN
Clerk of the Court

No. _____ 05-699

IN THE

SUPREME COURT OF THE UNITED STATES

KENDRA MUSGRAVE,

Petitioner(s),

against

LAWRENCE P. WOLF, ESQ.,

Respondent(s)

On Petition For Writ Of Certiorari to the
United States Court of Appeals
For the Second Circuit

SUPPLEMENTAL APPENDIX TO THE PETITION

KENDRA MUSGRAVE
Pro Se
9985 Appletree Place
Thornton, Colorado 80260
303-452-2854

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KENDRA MUSGRAVE,

Plaintiff,

-against-

LAWRENCE P. WOLF, Esq.,

Defendant.

FILED
IN THE CLERKS OFFICE
U.S. DISTRICT COURT E.D.N.Y.
May 21, 2004

ORDER

03 CV 2511 (RJD)(LB)

DEARIE, District Judge

On April 1, 2004 Magistrate Lois Bloom recommended that the Court grant defendant's motion to dismiss the Plaintiff's complaint with prejudice pursuant to Fed. R. 37(b)(2)(C). Plaintiff filed timely objections, arguing that she did not appear for her deposition because 1) at the time the deposition was to take place, a motion for reconsideration of Magistrate Judge Bloom's order directing the deposition was pending before this Court; 2) a deposition is unnecessary because the plaintiff cannot offer any further information without violating the doctrines of res judicata, Rooker-Feldman, and abstention; 3) this Court is without jurisdiction under the Fair Debt Collection Practices Act to order discovery; 4) the defendant's attorney is not admitted to practice law in the Eastern District; and 5) summary judgment should be granted in her favor because there are no genuine issues of material fact.

A pending motion for reconsideration does not relieve a party of its obligation to comply with a court order. Moreover,

while it is true that there was a pending motion at the time of the plaintiff's deposition, the plaintiff's first motion for reconsideration, which requested review of Magistrate Judge Bloom's first Order directing the plaintiff's deposition, was denied by this Court on October 20, 2003, at least two weeks before the deposition was to take place.

With respect to the plaintiff's remaining objections, the Court notes that it already rejected most of these arguments in its previous orders and it finds the remaining arguments either inaccurate statements of the law or unpersuasive. The Court agrees with the Magistrate Judge that the requirements of Fed. R. Civ. P. 37 have been satisfied, and therefore adopts Magistrate Judge Bloom's recommendation without qualification.

The Clerk of the Court is hereby directed to close the case.

SO ORDERED

Dated: Brooklyn, New York

May 19, 2004

Signed by Raymond J. Dearie
RAYMOND J. DEARIE
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

KENDRA MUSGRAVE,

Plaintiff,

-against-

LAWRENCE P. WOLF, Esq.,

Defendant.

----------X

REPORT AND RECOMMENDATIONS
03-CV-2511 (RJD)(LB)

BLOOM, United States Magistrate Judge:

Plaintiff filed the instant action under the Fair Debt Collection Protection Act ("FDCPA"), 15 U.S.C. § 1692, alleging that defendant unlawfully sought to collect a housing court judgment against her and her sublessor. When plaintiff failed to appear for her deposition as ordered by this Court, defendant filed the instant motion to dismiss the action with prejudice pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure. The Honorable Raymond J. Dearie, United States District Judge, referred defendant's motion to dismiss to the undersigned for a Report and Recommendation in accordance with 28 U.S.C.§ 636(b). For the reasons that follow, it is recommended that defendant's motion to dismiss plaintiff's complaint should be granted.

BACKGROUND

On or about August 25, 2003, defendant filed an answer in this matter and noticed plaintiff's deposition. [1] On September 5, 2003, plaintiff filed a motion for default or for summary judgment. In light of plaintiff's pro se status and defendant's answer, the Court scheduled an initial conference on October 8, 2003 to apprise plaintiff of the procedures governing the discovery process and to set deadlines. Although defendant's answer filed in Court included an affidavit of service, plaintiff asserted that she did not receive the answer until after it was filed with the Court and that she should therefore be allowed to cross examine the process server. (Transcript of October 8, 2003 Conference (hereinafter "Tr.__") at 9). The Court advised plaintiff the answer had been filed and accepted by the Court and the parties would proceed with discovery as defendant was entitled to discovery in order to oppose her motion for summary judgment. (Id. At 9-10).

The Court had the parties schedule a date, time, and place for plaintiff's deposition when plaintiff said she could appear in New York. (Tr. 13-14). Defendant requested that the deposition occur in the courthouse because of plaintiff's pro se status. The Court denied the request and stated that if plaintiff "fails to cooperate (with her deposition), then there are sanctions for failure to cooperate, which could include dismissal of her complaint with the Court." (Tr. 10) see also (Tr. 22 ("[plaintiff's] gotten a clear message from the Court, today, that she's expected in your office on November 6th at 9:30 a.m. If, for any reason, she fails to appear, it's a Court order. So, under Rule 16 and 37, there are sanctions for failure to appear.")). Additionally, since plaintiff disputed that she was properly served with defendant's answer, the Court informed

---

[1] Although defendant noticed plaintiff's deposition for September 24, 2003, the deposition was rescheduled by the Court's October 8, 2003 order.

plaintiff that the date agreed upon in Court was "a date certain, because it's going to be a so-ordered deposition date." (Tr. 14). The Court then denied plaintiff's request to limit the deposition because of the prior proceedings in state court. (Tr. 17-18). Finally, in response to plaintiff's question of "what (deposition) questions do I not have to answer," the Court stated:

> Ms. Musgrave, I'm telling you, unless it's based on privilege, you are going to have to answer their questions. They have seven hours. If it's a waste of their time, so be it. If it's not going to help them in their case, so be it, but you must cooperate. This is not a game. You've brought a federal court action. You're permitted to proceed, but you are not permitted to try to waste anybody's time.

(Tr. 24). After the conference, the schedule agreed upon by the parties in Court was memorialized by Court Order, which directed plaintiff to "appear for her deposition in defendant's office on November 6, 2003 at 9:30 a.m. . . . ." (Order, dated October 8, 2003).

By motion dated October 20, 2003, plaintiff moved for a stay and reconsideration of the October 8, 2003 order ("First Motion for Reconsideration"). Plaintiff argued that (1) defendant failed to serve her with his answer and therefore defendant lacks "standing" to depose her, (2) a Magistrate Judge is without authority to order a deposition, and (3) "[she] can offer no further information relevant to answering the question [she] presented in [her] complaint." (First Motion for Reconsideration, at p. 4). The Court denied plaintiff's motion by endorsement on October 20, 2003.

By order dated October 23, 2003, which was sent by express and regular mail to plaintiff on the same date, the

undersigned notified plaintiff that her motion for reconsideration had been denied and reiterated the Court's order that she appear for her November 6, 2003 deposition. (Order dated October 23, 2003). The order warned plaintiff that even though she is proceeding pro se, "should she failed to appear for her deposition, her case is subject to dismissal with prejudice." Id. (citing Fed. R. Civ. P. 37(b)(2)(C) and Valentine v. Museum of Modern Art, 29 F.3d 47 (2d Cir. 1994)).

On November 3, 2003, plaintiff moved for reconsideration of the Court's October 23, 2003 order ("Second Motion for Reconsideration"), on the grounds that (1) defendant's attorney is not admitted to the Eastern District of New York, (2) defendant failed to serve her with his answer, (3) defendant failed to timely file an answer, and (4) "[she] can offer no further information relevant to answering the question [she] presented to the Court in [her] complaint." (Second Motion for Reconsideration, at ¶¶ 5, 16, 71, 76). Plaintiff failed to appear for her deposition on November 6, 2003 and defendant filed the instant motion. Plaintiff's Second Motion for Reconsideration was denied on November 14, 2003. Defendant seeks dismissal of the complaint under Rule 37(b)(2)(C) arguing "it is clear that plaintiff is using motion practice to delay, to hinder, and to harass the defendant. It is also clear that plaintiff will never submit to discovery." (Defendant's Motion at ¶ 16).

In her opposition to the instant motion, plaintiff raises substantially the same arguments raised in her motions for reconsideration. Specifically, plaintiff asserts (1) defendant's attorney is not admitted in the Eastern District of New York, (2) defendant failed to serve her with his answer prior to filing the answer with the Court, (3) a Magistrate Judge lacks authority to order depositions, and (4) "[she] can offer no further information relevant to answering the question [she]

presented to the Court in [her] complaint." (Plaintiff's Opposition to Motion to Dismiss at ¶¶ 7, 19, 26-28 and p. 13).

While the instant motion was still pending, on November 21, 2003, plaintiff filed a third motion for reconsideration, entitled, "Notice of Appeal," seeking to overturn the Court's October 23, 2003 order. ("Third Motion for Reconsideration"). In denying this motion, the Court advised plaintiff that "if she continues to litigate in this manner, she may be subject to appropriate sanctions." (Order dated January 14, 2004.)[2]

DISCUSSION

Pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, the Court may dismiss a complaint for a party's failure to comply with a Court order regarding discovery. See Fed. R. Civ. P. 37(b)(2)(C) (". . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (C) [a]n order . . . dismissing the action of proceeding or any part thereof . . ."). In particular, Rule 37 applies to a litigant's failure to appear for his or her deposition. See e.g. Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759 (2d Cir. 1990) (affirming dismissal of action, pursuant to Fed. R. Civ. P. 37, for pro se plaintiff's refusal to appear at her deposition); Salahuddin v. Harris, 782 F.2d 1127 (2d Cir. 1986) (motion to dismiss for failure to participate in deposition is properly considered under Fed. R. Civ. P. 37).

In deciding whether to impose sanctions under Rule 37, the Court may consider the following factors: "(1) the willfulness of the noncompliant party or the reasons for

---

[2] The motion filed on November 21, 2003 was docketed on January 6, 2004.

noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the noncompliant party had been warned of the consequences of his non-compliance." Nieves v. City of New York, 208 F.R.D. 531, 535 (S.D.N.Y. 2002) (citing Bambu Sales, Inc., v. Ozak Trading Inc., 58 F.3d 849 (2d Cir. 1995)). "Dismissal under Fed. R. Civ. P. 37 . . . should be imposed only in extreme circumstances" where the failure to comply is due to "willfulness, bad faith, or any fault." Salahuddin, 782 F.2d at 1132 (internal quotes omitted). However, "[t]he severe sanction of dismissal with prejudice may be imposed even against a plaintiff who is proceeding pro se, so long as warning has been given that noncompliance can result in dismissal." Valentine v. Museum of Modern Art, 29 F.3d 47, 49 (2d Cir. 1994). This sanction is available even against pro se litigants because "while pro se litigants may in general deserve more lenient treatment than those represented by counsel, all litigants, including pro ses, have an obligation to comply with court orders. When they flout that obligation they, like all litigants, must suffer the consequences of their actions." McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 124 (2d Cir. 1988).

Plaintiff's reasons for not complying with the specific order of the Court to appear for her deposition have been repeatedly overruled by the Court. Plaintiff argues that "[she] can offer no further information relevant to answering the question [she] presented to the Court in [her] complaint" and the Court was without authority to order her deposition. These very same arguments were submitted in plaintiff's first motion for reconsideration and denied by the Court prior to the date of her deposition. Although "litigiousness by itself is neither semantically nor legally equivalent to bad faith," Salahuddin v. Harris, 782 F.2d 1127, 1133 (2d Cir. 1986), plaintiff's conduct herein demonstrates her wilfulness and bad faith. Plaintiff

advances the same arguments here that were summarily denied by Order dated October 20, 2003, prior to the date scheduled for plaintiff's deposition. Therefore, plaintiff's repetition of the same arguments already rejected by the Court cannot be construed as a zealous pro se litigant's "erroneous but good faith view of the law." See Salahuddin, 782 F.2d at 1132 (citing Weiss v. Bonsal, 344 F.2d 428, 430 (2d Cir. 1986)). Plaintiff's three motions for reconsideration raising the same arguments demonstrates her refusal to participate in discovery rather than a good faith misunderstanding of the law.

Moreover, the substance of plaintiff's arguments evidences bad faith. Plaintiff's contention that the Court is without authority to issue the discovery order or that she cannot offer any further information regarding the claims raised in her complaint demonstrate a wilful disregard for the Court's orders. See Bobal, 916 F.2d at 762 (Rule 37 dismissal proper where in response to the court's order that she appear for her deposition plaintiff stated, "I will not be available . . . This is an improper conference and I am not a party to this conference."). Plaintiff's remaining argument that the defendant's counsel is not admitted in this district has little if "any bearing on plaintiff's obligation to comply with the Court's discovery Orders in this case." Davidson v. Dean, 204 F.R.D. 251, 258 (S.D.N.Y. 2001) (attacks on defendant's counsel have no bearing on plaintiff's obligation to comply with Court orders). The Second Circuit has clearly stated that a litigant cannot refuse to comply with her discovery obligations because she asserts a Court order was erroneous; unless a stay is granted, "an order issued by a court must be obeyed, even if it is later shown to be erroneous." McDonald, 850 F.2d at 124 (pro se plaintiff failed to appear for his deposition because he asserted the court had erroneously denied him counsel). Here, no stay was granted and plaintiff's second motion for reconsideration did not stay her obligation to appear for her

Court-ordered deposition. Without a stay authorized by the Court, plaintiff's failure to attend her Court-ordered deposition cannot be excused.

Plaintiff's three motions for reconsideration and her instant opposition, all demonstrate a "continuous and flagrant disregard for the Court's directives." Quilles v. Beth Israel Med. Ctr, 168 F.R.D. 15, 19 (S.D.N.Y. 1996). See also Santos v. New York City Hous. Auth., 01-CV-1646, 2003 WL 1213335, at * 3 (S.D.N.Y. Mar. 17, 2003) (a "'persistent refusal to comply with a discovery order' is evidence of willfulness"). Her continuous attempts to overturn the order scheduling her deposition, including filing a "Notice of Appeal" while the instant motion was pending, make clear that lesser sanctions would be ineffective to insure plaintiff's compliance with the Court's orders. Notably, plaintiff never sought and does not now seek a rescheduling of her deposition, but rather argues that no deposition should be taken. Where plaintiff objects to being deposed concerning any aspect of the case, a limited sanction of precluding the pro se plaintiff from proffering certain evidence is inappropriate. See Davidson, 204 F.R.D. at 255. Instead, dismissal with prejudice is an appropriate sanction, especially where plaintiff's persistent refusal to participate in her deposition inspires no confidence in her future compliance. El-Yafi v. 360 East 72nd Owners Corp., 164 F.R.D. 12 (S.D.N.Y. 1995).

Here, the Court warned plaintiff that if she failed to appear at her deposition, the instant action could be dismissed with prejudice. See Tr. 10, 22, and Order, dated October 23, 2003. Plaintiff's refusal to comply with the Court's order and her wilful disregard for the Court's authority warrants dismissal of the complaint with prejudice. See Bobal, 916 F.2d 759 (2d Cir. 1990) (pro se plaintiff stated the conference scheduling her deposition was improper and failed to appear at deposition); McDonald, 850 F.2d 121 (2d Cir. 1988) (pro se

plaintiff refused to answer questions at deposition, even when reminded of his obligation to the court's orders). Here, as in Bobal and McDonald, plaintiff's failure to appear at her deposition is based not on a misunderstanding but on plaintiff's wilfulness and bad faith.

CONCLUSION

Accordingly, it is recommended that defendant's motion should be granted and plaintiff's complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 37(b)(2)(C). See McDonald v. Head Criminal Court Supervisor, 117 F.R.D. 55, 58 (S.D.N.Y. 1987), *aff'd* 850 F.2d 121 (2d Cir 1988) (dismissal is proper where plaintiff refuses to play by the "basic rules of the system upon whose very power the plaintiff is calling to vindicate his rights").

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made to the District Judge within the ten day period. Failure to file a timely objection to his Report generally waives any further judicial review. Marcella v. Capital Dist. Physician's Health Plan, Inc., 293 F. 3d 42 (2d Cir. 2002); Small v. Secretary of Health and Human Services, 892 F.2d 15 (2d Cir. 1989); see Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED

Signed by Lois Bloom
LOIS BLOOM
United States Magistrate Judge

Dated: April 1, 2004
Brooklyn, New York